

10-3581-cv (L)
S.E.C. v. Gabelli

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals for the Second Circuit, held at the
2 Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd
3 day of May, two thousand thirteen.
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5 Present:

6 DEBRA ANN LIVINGSTON,
7 DENNY CHIN,
8 *Circuit Judges,*
9 JED S. RAKOFF,*
10 *District Judge.*
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13 SECURITIES AND EXCHANGE COMMISSION,
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15 *Plaintiff-Appellant/Cross-Appellee,*
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17
18 v.
19

Nos. 10-3581-cv (Lead)
10-3628 (XAP)
20 10-3760 (XAP)

21 MARC J. GABELLI and BRUCE ALPERT,
22

23 *Defendants-Appellees/Cross-Appellants.*
24

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

Dominick V. Freda (Jacob H. Stillman, Hope Hall Augustini, *on the brief*), Securities and Exchange Commission, Washington, D.C., *for Plaintiff-Appellant/Cross-Appellee*.

Lewis J. Liman (Kimberly C. Spiering, Katherine L. Wilson-Milne, David R. Lurie, *on the brief*), Cleary Gottlieb Steen & Hamilton LLP, New York, New York, *for Defendant-Appellee/Cross-Appellant Gabelli*.

Kathleen N. Massey (Edward A. McDonald, Joshua I. Sherman, *on the brief*), Dechert LLP, New York, New York, *for Defendant-Appellee-Cross-Appellant Alpert*.

Appeal from the United States District Court for the Southern District of New York (Batts, J.).

ON CONSIDERATION WHEREOF, it is hereby **ORDERED, ADJUDGED**, and **DECREED** that the judgment of the district court be and hereby is **AFFIRMED** in part and **REVERSED** in part.

This case comes to us on remand from the Supreme Court. We presume the parties' familiarity with the facts and procedural history, which we recount only to the extent necessary to explain our decision.

Plaintiff-Appellant/Cross-Appellee Securities and Exchange Commission ("SEC") alleges that Defendants-Appellees/Cross-Appellants Marc J. Gabelli and Bruce Alpert, while prohibiting most investors in their Gabelli Global Growth Fund from engaging in a form of short-term trading called "market timing," secretly permitted one investor to market time the Fund in exchange for an investment in a hedge fund managed by Gabelli. Compl. ¶¶ 1, 20-21, 17, 31, 35-38, 42, 44-45. Because the market timing was alleged to have occurred between 1999 and August 2002, and the

1 SEC's action was not filed until April 2008, the district court, among other rulings, dismissed the
2 SEC's civil penalty claims as time barred by the five-year statute of limitations set forth in 28 U.S.C.
3 § 2462. In Securities and Exchange Commission v. Gabelli, 653 F.3d 49 (2d Cir. 2011), this Court,
4 inter alia, reversed that dismissal, but the Supreme Court in turn reversed that part of this Court's
5 decision. See Gabelli v. Sec. & Exch. Comm'n, 133 S. Ct. 1216 (2013). This reversal, however,
6 does not affect this Court's other holdings in its prior opinion. Therefore, this Court now affirms
7 the district court's dismissal of the SEC's civil penalty claims under the Investment Advisers Act
8 but otherwise adheres to its earlier opinion.

9 Accordingly, the judgment of the district court is **AFFIRMED** in part and **REVERSED** in
10 part, and the case is **REMANDED** for further proceedings consistent with this Order.

11 FOR THE COURT:
12 CATHERINE O'HAGAN WOLFE, CLERK

The image shows a handwritten signature in black ink that reads "Catherine O'Hagan Wolfe". The signature is written over a circular official seal of the United States Second Circuit Court of Appeals. The seal is blue and white with the words "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS" around the perimeter.